BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
DEC 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF BELMONT, NEW HAMPSHIRE,

Petitioner,

v.

ELIZABETH DOLE, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, THE SOCIETY OF PROFESSIONAL ARCHEOLOGISTS, AND THE AMERICAN SOCIETY FOR CONSERVATION ARCHAEOLOGY, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ELIZABETH S. MERRITT
(Counsel of Record)
CATHARINE M. GILLIAM
Office of the General Counsel
National Trust for Historic Preservation
1785 Massachusetts Avenue N.W.
Washington, D.C. 20036
(202) 673-4035
Counsel for the National Trust for Historic Preservation in the United States

ROBERT W. GETTLEMAN
D'ANCONA & PFLAUM
30 North LaSalle Street
Chicago, Illinois 60602
(312) 580-2000
Counsel for the Society of Professional Archeologists

CHARLES R. COLE
315 North Third Street
Grand Junction, Colorado 81501
(303) 242-5531
Counsel for the American Society for Conservation Archaeology

December 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

24pp

QUESTION PRESENTED

Whether the First Circuit erred in upholding a Department of Transportation regulation exempting certain archeological sites from the protection of Section 4(f) of the Department of Transportation Act, when the regulation is fundamentally inconsistent with the statute and therefore invalid?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
INTEREST OF THE *Amici Curiae*	1
RELEVANT STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	6
REASONS FOR GRANTING THE WRIT	8
1. *The First Circuit's Decision is in Direct Conflict with Section 4(f) of the Department of Transportation Act, as Construed by This Court in Overton Park*	8
2. *The First Circuit's Decision is in Direct Conflict with Other Circuits*	12
3. *The First Circuit's Decision is Diametrically Opposed to Sound Archeological and Preservation Principles, and Will Result in a Significant Loss of the Cultural Resources that Congress Intended to Protect*	15
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Benton Franklin Riverfront Trailway and Bridge Committee v. Lewis, 701 F.2d 784 (9th Cir. 1983) . 6, 12, 13

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 6, 8, 9

Druid Hills Civic Association, Inc. v. Federal Highway Administration, 772 F.2d 700 (11th Cir. 1985) 7, 13, 14

Louisiana Environmental Society, Inc. v. Coleman, 537 F.2d 79 (5th Cir. 1976) 6-7, 8, 14, 15

National Trust for Historic Preservation v. Dole, No. 85-2749 (D.D.C. Oct. 3, 1985) 14

Securities and Exchange Commission v. Sloan, 436 U.S. 103 (1978) 9, 12

Stop H-3 Ass'n v. Coleman, 533 F.2d 434 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976) 11

Trailer Marine Transport Corp. v. Federal Maritime Comm'n, 602 F.2d 379 (D.C. Cir. 1979) 3

STATUTES

16 U.S.C. §§ 461-467 1

16 U.S.C. § 468 1

16 U.S.C. § 470 1

16 U.S.C. § 470a 17

16 U.S.C. § 470f 1, 4, 11, 14

16 U.S.C. § 470i(a)(8) 1

16 U.S.C. § 470j 1

23 U.S.C. § 138 ..... 2, 3

49 U.S.C. § 303 ..... 2, 3, 5, 6, 8

REGULATIONS

23 C.F.R. § 771.135(c) 11

23 C.F.R. § 771.135(f)(1) 3-4, 5, 10

36 C.F.R. § 60.3(j) 17

36 C.F.R. § 60.4 ..... 5, 17

Table of Authorities Continued

	Page
36 C.F.R. § 800.3(b)	14
36 C.F.R. § 800.6	10, 11
OTHER	
Pub. L. No. 97-449, 96 Stat. 2419 (1983)	3
48 Fed. Reg. 34,894 (1983)	10
128 Cong. Rec. H9543-44 (Dec. 13, 1982)	3

INTRODUCTION

Pursuant to Rule 36 of the Rules of this Court, the National Trust for Historic Preservation in the United States, the Society of Professional Archeologists, and the American Society for Conservation Archaeology respectfully submit this brief as *amici curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit. Consent to appear as *amici* has been obtained from the United States and from the petitioner, Town of Belmont, as evidenced by letters filed with the Clerk of this Court.

INTEREST OF THE *AMICI CURIAE*

The National Trust for Historic Preservation in the United States was chartered by Congress in 1949 to protect and defend America's historic resources. As a private, nonprofit, charitable and educational corporation, the National Trust's congressional mandate is to further the historic preservation policy of the United States and to preserve sites, buildings and objects significant in American history and culture. 16 U.S.C. § 468; *see id.* §§ 461-467. The National Trust has approximately 150,000 individual members and 1500 member organizations. The National Trust's Chairman is by statute a member of the Advisory Council on Historic Preservation, an independent federal agency, which is required to comment on all federal undertakings affecting historic resources. *Id.* §§ 470f, 470i(a)(8). The Advisory Council's duties also include reviewing the policies and programs of other federal agencies to ensure consistency with the historic preservation policy adopted by Congress. *See id.* §§ 470, 470j. The National Trust's expertise on historic preservation issues is nationally recognized, and its strong commitment to the protection of archeological resources is a significant priority for the Trust.

The Society of Professional Archeologists (SOPA) is a national, nonprofit archeological organization incorporated under Illinois law. The purpose of SOPA is to promote compliance

with professional standards in the study and protection of archeological resources. SOPA accepts into its membership individuals who have met rigorous educational and practical criteria, and have attained a level of accomplishment that merits certification as a professional archeologist. Members are obligated to comply with the professional Code of Ethics and Standards of Research Performance published by SOPA. Among the ethical standards is a requirement that the membership "actively support conservation of the archeological resource base."

The American Society for Conservation Archaeology is a nonprofit membership organization, incorporated under Nevada law, which is dedicated to the conservation of America's archeological heritage, and to promoting the conservation ethic within the archeological profession. Membership in the American Society for Conservation Archaeology is open to individuals and organizations interested in the conservation of archeological resources and in promoting responsible cultural resource management.

The *amici curiae* strongly oppose the decision of the First Circuit in *Belmont v. Dole* because the decision was based on a misinterpretation of the law and a misunderstanding of archeological principles. If the regulation upheld by the First Circuit remains in effect, the result will be the devastating loss of America's irreplaceable archeological resources.

RELEVANT STATUTES AND REGULATIONS

Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 303, prohibits the Secretary of Transportation from approving any federally funded project that requires the use of any historic site, public parkland, recreational area, or wildlife refuge, *unless* (1) there is no feasible and prudent alternative to the use of the site and (2) the project includes all possible planning to minimize harm to the protected areas.

Section 4(f) of the Department of Transportation Act is virtually identical to Section 18(a) of the Federal-Aid Highway

Act, 23 U.S.C. § 138. The two statutes are referred to collectively as "Section 4(f)." Section 4(f) provides as follows:

> [T]he Secretary [of Transportation] shall not approve any program or project which requires the use of any publicly owned land from a public park, recreational area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

23 U.S.C. § 138; 49 U.S.C. § 303.[1]

The regulation at issue in this case, which was promulgated by the Department of Transportation (DOT), allows the DOT to eliminate compliance with Section 4(f) in cases involving archeological sites, if the DOT determines that the archeological resource at stake is "important chiefly for the information it contains and has minimal value for preservation in place." The regulation provides as follows:

> Section 4(f) applies to all archeological sites on or eligible for inclusion on the National Register [of Historic Places], including those discovered during construction, unless the [Federal Highway] Administration, after consultation with the State Historic Preservation Officer and the Advisory Council on Historic Preservation, determines that the archeological resource is important chiefly for the information it contains and has minimal value for preser-

---

[1]On January 12, 1983, the provisions of Section 4(f) (formerly 49 U.S.C. § 1653(f)) were recodified as 49 U.S.C. § 303, as part of an overall recodification of Title 49. Pub. L. No. 97-449, 96 Stat. 2419 (1983). The recodification makes "no substantive change" in any provisions of that Title. 128 Cong. Rec. H9543-44 (Dec. 13, 1982)(citing Trailer Marine Transport Corp. v. Federal Maritime Comm'n, 602 F.2d 379, 383 (D.C. Cir. 1979)).

> vation in place. Such archeological resources which do not warrant preservation in place may be recovered in accordance with a resource recovery plan developed in compliance with 36 CFR Part 800.

23 C.F.R. § 771.135(f)(1).

Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, requires that, prior to the approval of any federally assisted undertaking, the federal agency must "take into account" the effect of the undertaking on any historic site or district, and shall afford the Advisory Council on Historic Preservation an opportunity to comment on the project. Section 106 provides in pertinent part as follows:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State . . . shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f.

STATEMENT OF THE CASE

This case arises from a proposal by the New Hampshire Department of Public Works and Highways to construct a 12-mile bypass from Franklin to Laconia, New Hampshire, passing through the Towns of Belmont and Tilton. The proposed four-lane highway would also require the use of land from the Lochmere Archeological District, a 90-acre historic district, which the U.S. Department of the Interior listed in the National Register of Historic Places in 1982. The district has both prehistoric and historic significance, with at least 13 sites of

prehistoric Native American occupation and 18 sites of Euro-American settlement and industry.[2] The district was nominated and listed in the National Register for the significance of its historical association with the early settlement of Belmont and Tilton, and for its association with the early industrial use of New Hampshire's major rivers.

The U.S. Department of Transportation prepared a draft Environmental Impact Statement (EIS) for the project in 1977, and the Secretary of Transportation approved the final EIS in June 1981. During the environmental review process, the Department of Transportation made a determination not to comply with Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303. The Department took the position that Section 4(f) did not apply to the project, relying on the challenged regulation, which allows the Department to avoid complying with Section 4(f) in cases where the threatened historic resource is an archeological site, if the Department makes certain preliminary findings about the site. 23 C.F.R. § 771.135(f)(1).

On May 9, 1983, the Towns of Belmont and Tilton filed suit in the United States District Court for the District of New Hampshire, challenging the archeological regulation as invalid and seeking to enjoin the project. The district court on August 20, 1983 declared the regulation invalid on the ground that it is inconsistent with Section 4(f), and issued a permanent injunction. *Town of Belmont v. Dole*, No. C83-241-L (D.N.H. Aug. 20, 1983). The New Hampshire Department of Public Works and Highways, a defendant in the district court, chose not to appeal the decision. The Department of Transportation, however, appealed the case and the First Circuit reversed on June 27, 1985. *Town of Belmont v. Dole*, 766 F.2d 28 (1st Cir. 1985). The Town of Belmont filed its petition for certiorari on September 18, 1985.

---

[2]The National Register of Historic Places includes archeological sites of both historic and prehistoric significance. 36 C.F.R. § 60.4. These sites will be referred to collectively as "historic."

SUMMARY OF THE ARGUMENT

This Court should grant the petition for certiorari because the regulation upheld by the First Circuit's opinion is in direct conflict with Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303, as construed by this Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Section 4(f) prohibits the Secretary of Transportation from approving any federally funded project, such as the highway at issue, which requires the use of land from any historic site, unless there is no feasible and prudent alternative to the use of the site and the project includes all possible planning to minimize harm.

The regulation upheld by the First Circuit flagrantly circumvents this explicit congressional limitation on the authority of the Secretary of Transportation to approve highway projects. The regulation creates an exemption to the statute for archeological sites by allowing the Department of Transportation to choose to excavate sites rather than find alternative routes to avoid destruction of the sites. In effect, the regulation allows the Department to decide whether or not to comply with a statute that Congress intended to be mandatory. Since the regulation cannot be reconciled with the statute, the First Circuit's decision must be reversed.

The decision below already is being misinterpreted by the lower courts, and is in direct conflict with cases from other circuits. It is in conflict with the Ninth Circuit's decision in *Benton Franklin Riverfront Trailway and Bridge Committee v. Lewis*, 701 F.2d 784 (9th Cir. 1983), in which the court recognized that the entire purpose of Section 4(f) would be defeated if the Department were allowed to remove structures and objects from historic sites, thereby causing the sites to lose their historic significance and rendering Section 4(f) inapplicable. Yet a procedure to circumvent Section 4(f) by removing objects from historic sites is precisely what the First Circuit has sanctioned in upholding the disputed regulation.

The decision is also in conflict with the Fifth Circuit's opinion in *Louisiana Environmental Society, Inc. v. Coleman*, 537

F.2d 79 (5th Cir. 1976), in which the court held that it is impermissible to consider the "degree" of harm to a protected site in determining whether Section 4(f) applies. *Any* use, "regardless of its degree," mandates compliance with Section 4(f). *Id.* at 84. As a matter of archeological principle, any excavation of an archeological site necessarily harms the site. The First Circuit has improperly allowed the degree of harm to be considered by permitting archeological excavations, which use and harm historic sites, without requiring Section 4(f) compliance.

The Eleventh Circuit, too, is in conflict with the First Circuit's ruling. In *Druid Hills Civic Association v. Federal Highway Administration*, 772 F.2d 700 (11th Cir. 1985), the court confirmed that "Congress enacted *no exceptions*" to the requirements of Section 4(f). *Id.* at 716 n.19 (emphasis added). The First Circuit, on the other hand, has permitted just such an exception to the statute — an exception written by the Department of Transportation itself.

Finally, the First Circuit's opinion is fundamentally inconsistent with sound archeological and preservation principles, and will result in a significant loss of the cultural resources that Congress intended to protect by enacting Section 4(f). The First Circuit's opinion was apparently based on its assumption that the disputed regulation would benefit archeological sites by encouraging the excavation of artifacts from the sites. That assumption is absolutely wrong. In reality, the regulation promotes and encourages the systematic destruction of archeological sites by highway construction. Although removal and preservation of individual artifacts is usually the least harmful method of destroying an archeological site, it is nevertheless destruction rather than preservation. Preservation of a site in place is *always* preferable to excavation. The First Circuit's misunderstanding of this basic principle of archeology (rendered without the benefit of input from historic preservation or archeological experts such as the *amici*), and its misunderstanding of the law under Section 4(f), will lead to the loss and destruction of irreplaceable archeological resources nationwide.

Accordingly, this Court should grant the petition for certiorari and should reverse the decision of the First Circuit.

REASONS FOR GRANTING THE WRIT

1. The First Circuit's Decision is in Direct Conflict with Section 4(f) of the Department of Transportation Act, as Construed by This Court in *Overton Park*.

Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303, prohibits the Secretary of Transportation from approving any federally funded project that requires the use of any historic site, public parkland, recreational area, or wildlife refuge, *unless* (1) there is no feasible and prudent alternative to the use of the site and (2) the project includes all possible planning to minimize harm to the protected areas. This statute is one of the most stringent environmental and historic preservation laws ever enacted. Section 4(f) is "a plain and explicit bar to the use of federal funds" for highway projects that affect historic sites and parks. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971).

As this Court has recognized, the very existence of this statute indicates that Congress intended the protection of historic sites and parklands to be given "paramount importance" in the planning and approval of federal highway projects. *Id.* at 412-13. Accordingly, the Department of Transportation may never use these protected sites for highway projects unless there are "*truly unusual factors* present ir a particular case or the cost or community disruption resulting from alternative routes reache[s] *extraordinary magnitudes*." *Id.* at 413 (emphasis added).

The duties imposed by Section 4(f) are *not* a matter of agency discretion. *Id.* at 411-13. If there is a feasible and prudent alternative to the use of Section 4(f) resources, the Department of Transportation *must* adopt that alternative. *Id.; Louisiana Environmental Society, Inc. v. Coleman*, 537 F.2d 79, 84 (5th Cir. 1976). Accordingly, the Department has strong incentive

to avoid the initial application of Section 4(f) whenever possible.

The First Circuit's opinion is contrary to the "plain and explicit" language of Section 4(f),[3] as construed by this Court in *Overton Park*, because it allows the Department of Transportation itself to decide whether or not to comply with a statute that Congress intended to be mandatory. The regulation upheld by the First Circuit creates an exemption to the statute for archeological sites by allowing the Department of Transportation to choose to excavate sites rather than find alternative routes to avoid destruction of sites. Accordingly, the regulation itself is invalid because it cannot be reconciled with the language of the statute. *See Securities and Exchange Commission v. Sloan*, 436 U.S. 103, 121-23 (1978).

The First Circuit attempted to justify its decision to uphold the archeological regulation by asserting that the regulation contains "sufficient substantive and procedural safeguards to prevent its being applied in a manner that would undercut its, and § 4(f)'s, preservationist goals." 766 F.2d at 33. The very suggestion that "safeguards" could compensate for the creation of a major exemption from the statute is preposterous. The court's rationale implicitly concedes the judicial erosion of Section 4(f). The three examples of "safeguards" cited by the court further illustrate the court's basic misunderstanding of the law and of archeological principles.

First, the court stated that the regulation does not apply to archeological sites that have significance "in place." *Id.* But the court failed to recognize that the determination of "significance in place" lies solely in the hands of the Department of Transportation, which has every incentive to decide that a site need *not* be preserved in place in order to avoid complying with Section

---

[3]As this Court recognized in *Overton Park*, the courts must look to the strict language of the statute itself for the legislative intent, since the legislative history of Section 4(f) is ambiguous. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at 412 n.29.

4(f).[4] Although the regulation requires the Department to consult with the State Historic Preservation Officer and the Advisory Council on Historic Preservation in making this determination, their comments are not binding. *See* 36 C.F.R. § 800.6. Ultimately, this first "safeguard" is no more than a statement that the exception created by the Department is limited. But it is still an exception, which is fundamentally inconsistent with the statute itself and with this Court's opinion in *Overton Park*.

The second "safeguard," according to the First Circuit, is that the regulation does not apply unless a "resource recovery plan" is developed in consultation with the Advisory Council on Historic Preservation and the State Historic Preservation Officer. 766 F.2d at 33. Ironically, the Department of Transportation has proposed amending the regulation to omit this "safeguard" altogether. 48 Fed. Reg. 34,894, 34,906 (1983). Even the existing regulation does not make such a plan mandatory; it merely provides that the artifacts "*may*" be recovered in accordance with a plan. 23 C.F.R. § 771.135(f)(1). Archeological excavations undertaken by the Department, even if pursuant to a "plan," are usually conducted under conditions that create tremendous pressure to accomplish the hastiest possible excavation of the site. The current regulation includes no substantive standards for recovery plans, but simply refers to the procedural regulations of the Advisory Council.

In relying on this rationale, it appears that the First Circuit has confused Section 4(f) with Section 106 of the National

---

[4]As the district court below recognized, the Secretary of the Interior, *not* the Secretary of Transportation, has jurisdiction to determine whether sites have historic significance. Petition for Cert. at 30. "[T]he Secretary of the Interior's decision to include [a district] on the National Register of Historic Places invokes all of the protections section 4(f) was designed to afford. Insofar as the Secretary of Transportation's regulation would act, in this case, to strip the District of those protections . . . the regulation is not only "out of harmony" with the Act of Congress, it is in direct opposition to the Act." *Id.* at 32.

Historic Preservation Act, 16 U.S.C. § 470f — a very different historic preservation statute. Section 4(f) contains a mandatory prohibition on the use of historic sites unless very strict criteria are satisfied. Section 106, on the other hand, provides a comparatively weak consultation process with no substantive restriction on the decisions made by the agency. It merely requires the agency to "take into account" the effect of its actions on historic sites. Although Section 106 requires the agency to consult with the State Historic Preservation Officer and the Advisory Council — as does the regulation at issue in this case — the agency is under no obligation to comply with their recommendations. *See* 36 C.F.R. § 800.6. The First Circuit, by allowing an optional consultation procedure to replace the strict substantive standards that would otherwise protect archeological sites, has diluted the fundamental essence of Section 4(f) and has contravened the explicit mandate of Congress and of this Court in *Overton Park*.

The third "safeguard" identified by the First Circuit was nothing more than the court's own assertion that all state and federal officials had agreed that the disputed site in Belmont did not warrant preservation in place. 766 F.2d at 31. This statement is simply wrong.[5] There is absolutely no evidence in

[5]The First Circuit based its assumption on the claim that "DOT says they are in agreement." 766 F.2d at 33. This statement represents a complete misunderstanding of the facts. The Department of Transportation alleged in its brief that there had been "no objection" by the Advisory Council, but admitted that it had not yet completed the process of consulting the Council. (Brief at 14-15.) Since the Advisory Council had issued no comments at all on the proposal, the Council could hardly be characterized as agreeing that the regulation applies.

The First Circuit went on to suggest that, if there were a disagreement between DOT and the SHPO or Advisory Council about whether a site merited preservation "in place," Section 4(f) would apply. 766 F.2d at 33 (citing *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 441-42 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976)). Although the First Circuit correctly stated the law under *Stop H-3*, the court failed to point out that DOT's own regulations are in direct conflict with *Stop H-3*. The DOT regulations provide that, in the event of a disagreement as to the significance of an historic site, DOT is allowed to determine that Section 4(f) does *not* apply. 23 C.F.R. § 771.135(c). Thus the court's own language in *Belmont*, concurring with the *Stop H-3* case, suggests that this section of the DOT regulations is invalid.

the record that the Advisory Council had agreed to such a determination. Even such an agreement, however, would not preclude this Court from determining that the regulation is inconsistent with Section 4(f). *See Securities and Exchange Commission v. Sloan*, 436 U.S. at 118.

Therefore, the "safeguards" cited by the First Circuit in its effort to reconcile this regulation with the statute, besides having no basis in the law, are illusory. They cannot justify the existence of a regulation entirely inconsistent with the statute. Even though the language of Section 4(f) and this Court's guidance in *Overton Park* make clear that the Department of Transportation must comply strictly with Section 4(f), the First Circuit has allowed the Department to promulgate its own exemption from the statute. Accordingly, the Court should grant the petition for certiorari and reverse the decision of the First Circuit.

2. The First Circuit's Decision is in Direct Conflict with Other Circuits.

The *Belmont* opinion is in direct conflict with the opinion of the Ninth Circuit in *Benton Franklin Riverfront Trailway v. Lewis*, 701 F.2d 784 (9th Cir. 1983). The *Benton Franklin* case involved a proposal by the Department of Transportation to demolish an historic bridge over the Columbia River between Oregon and Washington. The defendants argued, as here, that Section 4(f) would not apply because the project would not require the "use" of "land" from an historic site; the bridge structure was not "land," and once it was removed, the land itself would no longer have any historic value. The Ninth Circuit, however, squarely rejected this argument, holding that Section 4(f) cannot be circumvented by removing historic objects from a site:

> [This] reading of § 4(f) is entirely too restrictive and lacks logic. There would be no sense in allowing the destruction and removal of structures on land and then determining whether the "land" will be used by the proposed federal action. The land will often lose its historical significance

> once the object is removed. Hence, we conclude the removal of the Old Truss Bridge . . . would be a use of "land from an historic site" and therefore § 4(f) of the Department of Transportation Act must be satisfied.

Id. at 788.

The First Circuit's opinion in the instant case is directly contradictory to the Ninth Circuit's sound holding in *Benton Franklin*. The First Circuit held that Section 4(f) did not apply to archeological sites covered by the regulation for two reasons: (1) excavating an archeological site would not "use" the site under Section 4(f), since it would not be "adverse" or injure the artifacts; and (2) once a site is excavated it would no longer have historic "significance." The First Circuit's rationale is exactly the reasoning that the Ninth Circuit properly rejected as "too restrictive," "lack[ing] logic," and making "no sense." 701 F.2d at 788. The Ninth Circuit recognized that allowing the Department to take this approach would subvert the entire purpose of Section 4(f).

The challenged regulation allows the Department of Transportation to determine that excavation is appropriate for any archeological site. If excavated, these sites certainly would lose their historic significance, would no longer be listed in the National Register, and would no longer be subject to any protection whatsoever. Furthermore, the Department has demonstrated an inclination to make the determination that excavation is appropriate even in cases where professional archeologists find excavation entirely *in*appropriate. Indeed, if the First Circuit's interpretation of Section 4(f) is allowed to stand, the door will be open to authorize the Department of Transportation to avoid Section 4(f) whenever an historic site can be altered or damaged in such a way that it would lose its historic significance and the statutory protection accompanying that status.

The First Circuit is also in conflict with the Eleventh Circuit, because it has authorized an exception to Section 4(f). In *Druid Hills Civic Association v. Federal Highway Administration*,

772 F.2d 700 (11th Cir. 1985), the court confirmed that "Congress enacted *no exceptions* to the requirements that there be no prudent alternatives to the use of parks and historic sites before the Secretary can approve a project using protected properties." *Id.* at 716 n.19 (emphasis added). The First Circuit, on the other hand, has permitted just such an exception to the statute — an exception written by the Department of Transportation itself. The danger of allowing an agency to create convenient exceptions to legislation is clear.

The nature and extent of the First Circuit's error is such that other courts are likely to misuse or misunderstand the precedent in *Belmont*, which will lead to further erosion of Section 4(f), contrary to the intent of Congress and the explicit guidance of this Court. Indeed, other federal courts have already begun to apply the language of the First Circuit's opinion improperly in other contexts. In *National Trust for Historic Preservation v. Dole*, No. 85-2749 (D.D.C. Oct. 3, 1985), for example, the district court, relying on the First Circuit's decision in *Belmont*, concluded that even a project involving the physical alteration of an historic structure and having an "adverse effect" on the site for purposes of the National Historic Preservation Act, *see* 16 U.S.C. § 470f; 36 C.F.R. § 800.3(b), would not "use" that site within the meaning of Section 4(f). The district court's reasoning squarely contradicts this Court's opinion in *Overton Park*. Therefore, the impact of the First Circuit's decision will reach beyond the many valuable archeological sites that are threatened, and ultimately will serve to allow the destruction of other historic resources as well.

The First Circuit's opinion further threatens to undermine Section 4(f) and *Overton Park* by allowing the consideration of factors that Congress intended to be impermissible. *See Louisiana Environmental Society, Inc. v. Coleman*, 537 F.2d 79 (5th Cir. 1976). As applied and interpreted in the *National Trust* case, *supra*, *Belmont* permits courts to consider the *degree* of harm in determining whether Section 4(f) applies. *National Trust for Historic Preservation v. Dole*, *supra*, slip op. at 7-8. The effect of this interpretation is to impose a

"substantial" use threshold on a statute that by its very terms is absolute. The implied "threshold" theory was firmly rejected by the Fifth Circuit nine years ago as inconsistent with *Overton Park*:

> This is traceable to a mistaken understanding of the impact of *Overton Park*. . . . [T]he Court's strict definition of § 4(f) prudence was not limited to factual situations involving severe takings or destruction of parkland [and historic sites]. Rather, the spirit of *Overton Park* is clearly to the effect that the statute is to be read broadly . . . . Neither did *Overton Park* enunciate any sort of substantial taking threshold for the applicability of § 4(f). The statute explicitly states that it is applicable whenever parkland will be "used for a highway project."
>
> . . . If courts were to interpret this section to permit an initial appraisal of whether the use was substantial, it would infuse consideration of elements (such as the degree of harm . . .) which Congress did not want considered when it said, if there is another way, take it. *Any* . . . use, *regardless of its degree*, invokes § 4(f).

Louisiana Environmental Society, Inc. v. Coleman, 537 F.2d 79, 84 (5th Cir. 1976)(emphasis added).

The circuit courts have interpreted Section 4(f) strictly in response to the Department of Transportation's continual challenges to the statutory limitations on its authority. It is critical that the First Circuit's decision be reviewed by this Court, and that the contested regulation be invalidated as inconsistent with Section 4(f).

3. The First Circuit's Decision is Diametrically Opposed to Sound Archeological and Preservation Principles, and Will Result in a Significant Loss of the Cultural Resources that Congress Intended to Protect.

The First Circuit's holding is based on the court's assumption that "the 'archeological regulation' in fact furthers the statute's preservationist goals." 766 F.2d at 30. Nothing could be further

from the truth. Excavation of an archeological site does *not* constitute "preservation." On the contrary, even formal excavation by a qualified archeologist is a form of total site destruction. Excavation should be carried out only as a last resort. If a decision is made to destroy a site, professional excavation is the best method to mitigate the harm caused by construction; nevertheless, the results will be the same — irreversible site destruction rather than preservation.

Archeological standards dictate that preservation of a site in place is preferable to excavation for several reasons. First, the value of an archeological site is never limited to the artifacts contained within it (contrary to the assumption of the First Circuit and of the DOT in its regulation). Archeological analysis requires systematic scientific study of the site as a whole. Such study centers not only on artifacts themselves, but it also focuses on a wide variety of surrounding physical remains such as snail shells, pollen grains, animal bones, carbonized seeds, wood samples and a whole host of ancillary data. In addition, the site's relationship to other sites in the surrounding area is critical. Thus, *any* excavation, no matter how carefully carried out, will destroy a large part of the contextual information that makes the site valuable as a depository of cultural remains.

Second, as members of a scholarly discipline, archeologists recognize that knowledge of techniques and methods of archeology are constantly improving. Several of the techniques now considered essential to a professional excavation have been developed only within the last ten years. Without question, techniques in the future will allow archeologists to obtain far more information from each site than would be possible if excavation were conducted today. Therefore, archeological sites should be preserved in place for as long as possible to ensure that the most advanced archeological techniques are brought to bear if excavation becomes necessary. The First Circuit's failure to recognize the importance of protecting sites in place may seem reasonable to the layman, but is entirely contrary to the most basic professional standards of archeology.

The First Circuit assumed that the term "strictly archeological" value (used to describe the Lochmere Archeological District) meant that the significance of the site was limited to its artifacts, as opposed to their context. This assumption is wrong.[6] While artifacts may have monetary value or contribute to a museum collection, an intact archeological site is *always* more valuable than the excavated artifacts. The DOT regulation utterly disregards this fundamental principle.

An archeological site is eligible for the National Register of Historic Places if it meets certain criteria, which are established by the Secretary of the Interior in consultation with national archeological associations. 16 U.S.C. § 470a.[7] Individual objects, including excavated artifacts, may be listed. *See* 36 C.F.R. § 60.3(j). But an archeological site is listed because it exists as a complex unit and has the potential to yield important information about the past. The contextual relationship between the artifacts and surrounding features cannot be retrieved as an "object." Only by their location, context and composition do artifacts reveal fully the information they contain about earlier cultures.

When excavation is performed under the tremendous pressure of impending highway construction, the result is the worst

---

[6]The Lochmere district itself was listed in the National Register not only for its pure archeological value, but also for the district's "historical association" with the early settlement of Belmont and Tilton and the early industrial use of New Hampshire's major rivers.

[7]The National Register eligibility criteria emphasize the importance of preserving archeological sites "in place." These criteria include:

> The quality of significance in American history, architecture, *archeology*, engineering, and *culture* is present in *districts*, *sites*, buildings, structures, and objects that possess *integrity of location*, design, *setting*, *materials*, workmanship, feeling, and *association* and
>
> . . .
>
> (d) that have yielded, or may be *likely to yield*, *information* important in prehistory or history.

36 C.F.R. § 60.4 (emphasis added).

possible situation for the archeological resources. Archeologists are frequently given unreasonably limited time to salvage whatever they can from a site prior to construction. With grossly inadequate time and financial resources, little can be done to preserve threatened sites.

Archeological sites are non-renewable physical representations of the past. Whenever the written records about the past are incomplete, scholars must rely on buried physical remains to expand society's knowledge of our otherwise undocumented past. Archeological sites are finite in number and, once destroyed, cannot be duplicated or replaced. Therefore, conservation of this resource is paramount and site excavation must be a carefully deliberated option only after all avenues of site protection have been fully explored. Congress has already made the determination that society's interest in preserving these sites outweighs the short-term interest in building highways as quickly and cheaply as possible.

CONCLUSION

For the reasons stated above, this Court should grant the petition for certiorari and should reverse the decision of the First Circuit.

Respectfully submitted,

ELIZABETH S. MERRITT
(Counsel of Record)
CATHARINE M. GILLIAM
Office of the General Counsel
National Trust for Historic Preservation
1785 Massachusetts Avenue N.W.
Washington, D.C. 20036
(202) 673-4035
Counsel for the National Trust for Historic Preservation

ROBERT W. GETTLEMAN
D'ANCONA & PFLAUM
30 North LaSalle Street
Chicago, Illinois 60602
(312) 580-2000
Counsel for the Society of Professional Archeologists

CHARLES R. COLE
315 North Third Street
Grand Junction, Colorado 81501
(303) 242-5531
Counsel for the American Society for Conservation Archaeology

December 1985